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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ORACLE USA, INC., a Colorado corporation;
and ORACLE INTERNATIONAL
CORPORATION, a California corporation,

Plaintiffs,

v.

RIMINI STREET, INC., a Nevada corporation;
SETH RAVIN, an individual,

Defendants.

Case No. 2:10-cv-0106-LRH-PAL

**DEFENDANT RIMINI STREET
INC.'S RESPONSE TO ORACLE'S
OBJECTIONS PURSUANT TO FED.
R. CIV. P. 56(c)(2) TO EVIDENCE
SUBMITTED IN SUPPORT OF
DEFENDANT'S OPPOSITION TO
ORACLE'S MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Defendant Rimini Street, Inc. hereby submits responses to objections made by Plaintiffs Oracle USA, Inc., Oracle America, Inc., and Oracle International Corporation (collectively, “Oracle”) to materials submitted with Defendant’s Opposition to Oracle’s Motion for Partial Summary Judgment.

I. LEGAL STANDARD FOR OBJECTIONS

A. Rule 56(c)(2)

Rule 56(c)(2) of the Federal Rules of Civil Procedure allows a party to object to evidence that “cannot be presented in a form that would be admissible in evidence.” Therefore, “[o]n summary judgment, a party need not present evidence in a form admissible at trial because at this stage, courts focus on the admissibility of the evidence’s contents rather than on the admissibility of the form.” *In re Agribiotech, Inc.*, 2005 U.S. Dist. LEXIS 6467, at *30 (D. Nev. Mar. 2, 2005) (citing *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003)).

B. Parol Evidence

Contrary to Oracle’s assertions, California courts recognize a broad exception to the parol evidence rule: “Extrinsic evidence is admissible to demonstrate that there is an ambiguity in an instrument and for the purpose of construing this ambiguity.”¹ *Adobe Sys. Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 1090 (N.D. Cal. 2000) (internal citations omitted); *see also A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc.*, 852 F.2d 493, 496 (9th Cir. 1988) (“The parol evidence rules requires that courts consider extrinsic evidence to determine whether the contract is ambiguous.”). Thus, a court must consider the “circumstances surrounding the making of the agreement including the object, nature and subject matter of the writing so that the court can place itself in the same situation in which the parties found themselves at the time of contracting.” *Sandberg v. State Farm Mut. Auto. Ins. Co.*, 1999 U.S. App. LEXIS 9264 (9th Cir. Cal. May 13, 1999). To do so, a court may consider industry customs, course of dealing, and course of performance in interpreting an

¹ Like California, Colorado no longer applies a rigid “four corners” rule, considering extrinsic evidence to determine whether the contract is ambiguous. *See Sola Salon Studios, LLC v. Heller*, No. 08-cv-01565-PAB-BNB, 2012 U.S. Dist. LEXIS 36247, at *6 (D. Colo. Mar. 19, 2012) (citations omitted).

1 ambiguity and in determining whether an ambiguity exists. *Adobe Sys.*, 84 F. Supp. 2d at 1090
2 (internal citations omitted). “It is reversible error for a trial court to refuse to consider such extrinsic
3 evidence on the basis of the trial court’s own conclusion that the language of the contract appears to
4 be clear and unambiguous.” *Wolf v. Superior Court*, 114 Cal. App. 4th 1343, 1350-51, 8 Cal. Rptr.
5 3d 649, 655 (Cal. App. 2004).

6 **C. Lack of Personal Knowledge**

7 Because Mr. Hilliard is offered by Rimini as an expert witness, Oracle’s objections under
8 Fed. R. Evid. 602 are misplaced under the plain language of that rule: “This rule does not apply to a
9 witness’s expert testimony under Rule 703.” Fed. R. Evid. 602. Indeed, under Fed. R. Evid. 703,
10 “[a]n expert may base an opinion on facts or data in the case that the expert *has been made aware of*
11 *or* personally observed.” Fed. R. Evid. 703 (emphasis added). Regardless, Mr. Hilliard has personal
12 knowledge of many of the facts in his declaration, as he describes throughout his declaration
13 including in the sections regarding his background and experience.

14 **D. Improper Expert Opinion**

15 Oracle objects under Fed. R. Evid. 702, pointing to a perceived “absence in Mr. Hilliard’s
16 declaration to offer any admissible evidence that would show a genuine dispute of material fact.”
17 Dkt. 286 at 3, ll. 6-7. However, “[i]f experts in the particular field would reasonably rely on
18 [particular] kinds of facts or data in forming an opinion on the subject, *[those facts or data] need not*
19 *be admissible for the opinion to be admitted.*” Fed. R. Evid. 703 (emphasis added). Further, “Expert
20 opinion is admissible and may defeat summary judgment if it appears the affiant is competent to give
21 an expert opinion and the factual basis for the opinion is stated in the affidavit, *even though the*
22 *underlying factual details and reasoning upon which the opinion is based are not.*” *Walton v. U.S.*
23 *Marshals Serv.*, 492 F.3d 998, 1008 (9th Cir. 2007) (emphasis added) (internal quotation marks
24 omitted); *see also Guidroz-Brault v. Mo. Pac. R.R. Co.*, 254 F.3d 825, 831-32 (9th Cir. 2001).

25 Mr. Hilliard does not merely “provide a laundry list of experience or material considered and
26 then separately offer a list of conclusions,” as Oracle suggests. Objections at 3, ll. 12-13. Rather,
27
28

1 Mr. Hilliard is an industry expert who has negotiated and interpreted hundreds of licenses similar to
2 those at-issue, and he offers testimony regarding his experience in the field, the facts he relies upon,
3 and his opinions regarding industry custom and usage for certain license language. His testimony is
4 thus "relevant and admissible to expose the latent ambiguity in the contract language regarding the
5 industry's customary usage," as well as to construing ambiguous terms. *Wolf v. Superior Court*, 8
6 Cal. Rptr. 3d 649, 659 (Cal. App. 2004) (holding that an expert with experience negotiating and
7 reviewing contracts may testify regarding the industry and accepted meanings of ambiguous contract
8 language).

9 **E. Hearsay**

10 As detailed herein, much of what Oracle contends is hearsay could easily be presented at trial
11 in admissible form, satisfying the requirements of Rule 56(c)(2). Further, much of what Oracle
12 objects to as hearsay is not hearsay at all, for it is not offered for the truth of the matter asserted.

13 **F. Legal Conclusion**

14 Industry experts may offer testimony regarding the accepted meaning of contract language
15 within a given industry. *Wolf v. Superior Court*, 8 Cal. Rptr. 3d 649, 659 (Cal. App. 2004). This is
16 precisely what the Hilliard Declaration does in the portions objected to by Oracle as improper legal
17 conclusion.

18 **G. Not Authenticated**

19 Oracle's authentication objections are largely baseless, but even where they are not the
20 requirements of Rule 56(c)(2) are satisfied because Rimini anticipates authenticating the documents
21 at trial. See Rule 56(c)(2); *In re Agribiotech, Inc.*, 2005 U.S. Dist. LEXIS 6467, at *30 (D. Nev.
22 Mar. 2, 2005); *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003).

23 **H. Requirement Of The Original Document**

24 Oracle's objections based on originality of licenses are meritless because the contents of the
25 attached exhibits "accurately reflect the information" of the original, executed licenses. Fed. R.

1 Evid. 1001(d). Regardless, Rimini anticipates offering the original documents at trial, satisfying
2 Rule 56(c)(2).

3 **II. THE HILLIARD DECLARATION AND EXHIBITS 31-35**

4 **Declaration Paragraph 1:**

5 I have been retained by counsel for the Defendants in connection with this matter. I have
6 attached a description of my accomplishments and relevant experience in my professional
7 biography, attached as Exhibit 31. I am over 18 years of age and am mentally competent to make
8 this declaration.

9 **Oracle's Objections:**

10 Oracle objects that this paragraph and exhibit are irrelevant.

11 **Rimini's Response:**

12 Paragraph 1 and Exhibit 31 relate Mr. Hilliard's "knowledge, skill, experience, training, or
13 education," which is relevant to establishing that "the affiant is competent to give an expert opinion"
14 in this case. *Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1008 (9th Cir. 2007); Fed. R. Evid. 702.

15 **Declaration Paragraph 2:**

16 My educational background includes an M.B.A. from Harvard Business School and a
17 Baccalaureate degree in mechanical engineering with Deans' List academic honors from the
18 Massachusetts Institute of Technology. In addition, I have lectured on computer systems and
19 programming for the Arizona State University School of Business and the American Management
20 Association. I held both line and staff positions for several major computer companies where I had
21 responsibilities in the areas of designing, developing, marketing and supporting a wide variety of
22 computer products used in both business and government applications.

23 **Oracle's Objections:**

24 Oracle objects that this paragraph is irrelevant.

25 **Rimini's Response:**

1 Paragraph 2 relates Mr. Hilliard's "knowledge, skill, experience, training, or education,"
2 which is relevant to establishing that "the affiant is competent to give an expert opinion" in this case.
3 *Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1008 (9th Cir. 2007); Fed. R. Evid. 702.

4 **Declaration Paragraph 3:**

5 Over the past 31 years, I have consulted to more than 200 companies, governmental agencies
6 and not-for-profit organizations regarding issues related to the selection, implementation and
7 ongoing support of business computer applications (including both hardware and software) to
8 perform functions comparable to the enterprise applications marketed and supported by Oracle. In
9 particular, I have consulted to clients that had licensed or were considering the license of Oracle's
10 PeopleSoft, J.D. Edwards, Siebel, and/or Oracle EBusiness Suite applications (or their predecessors).

11 **Oracle's Objections:**

12 Oracle objects that this paragraph is irrelevant.

13 **Rimini's Response:**

14 Paragraph 3 relates Mr. Hilliard's "knowledge, skill, experience, training, or education,"
15 which is relevant to establishing that "the affiant is competent to give an expert opinion" in this case.
16 *Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1008 (9th Cir. 2007); Fed. R. Evid. 702.

17 **Declaration Paragraph 4:**

18 I have reviewed more than 300 business system contracts (nearly all of which were either
19 solely software licenses or included software licenses as part of a package that also included related
20 hardware purchase and/or service contracts), and acted as a contract negotiator in more than 100
21 instances for consulting clients that were licensing business software for their use. I have also
22 reviewed more than 100 additional software licenses in the course of various expert witness
23 engagements where the licensed software was at issue in the litigation for which I was engaged.
24 Many of these licenses were for Oracle software, and nearly all were for business software products
25 that performed ERP or similar applications, comparable to those performed by Oracle's ERP and
26 database products.

1 **Oracle's Objections:**

2 Oracle objects that this paragraph is irrelevant.

3 **Rimini's Response:**

4 Paragraph 4 relates Mr. Hilliard's "knowledge, skill, experience, training, or education,"
5 which is relevant to establishing that "the affiant is competent to give an expert opinion" in this case.
6 *Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1008 (9th Cir. 2007); Fed. R. Evid. 702.

7 **Declaration Paragraph 5:**

8 In regard to this matter, I have reviewed information from Rimini Street including
9 information regarding their technical practices and procedures; I have reviewed Oracle documents
10 including license agreements for the software-at-issue and technical documents and
11 recommendations provided by Oracle to its licensees; I have reviewed documents relating to the
12 customs and practices of software vendors, their licensees, and various third party support providers
13 in the ERP software industry.

14 **Oracle's Objections:**

15 Oracle objects that this paragraph is irrelevant.

16 **Rimini's Response:**

17 Paragraph 5 describes Mr. Hilliard's "knowledge, skill, experience, training, or education,"
18 which is relevant to establishing that "the affiant is competent to give an expert opinion" in this case.
19 *Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1008 (9th Cir. 2007); Fed. R. Evid. 702.

20 **Declaration Paragraph 6:**

21 This case involves complex software platforms known as Enterprise Resource Planning
22 (ERP) systems. By the mid-1990s, ERP applications provided the ability to computerize functions
23 across the entire organization where they were implemented. By the decade of the 2000s, the most
24 successful developers of such enterprise software applications were Oracle, PeopleSoft, J.D.
25 Edwards, Siebel (CRM only) and SAP. Today, ERP systems are used primarily by large and mid-
26 size organizations to integrate internal and external management information, with the goal of

1 managing customer relationships, accounting, finances, supply chains, and human resources within a
2 single software platform.

3 **Oracle's Objections:**

4 Oracle objects that this paragraph is irrelevant, does not demonstrate personal knowledge,
5 and does not demonstrate any reliable factual basis for Mr. Hilliard to offer as expert opinions.

6 **Rimini's Response:**

7 This paragraph is relevant to "the circumstances in which a contract was written, the
8 subsequent conduct of the parties, and the common usage of particular terms in a given industry."
9 *Miller v. Glenn Miller Prods., Inc.*, 454 F. 3d 975, 989 (9th Cir. 2006). Even if the Court determines
10 a contract unambiguous, it is reversible error not to consider extrinsic evidence of industry custom.
11 *Wolf v. Superior Court*, 8 Cal. Rptr. 3d 649, 655-56 (Cal. App. 2004).

12 Mr. Hilliard has personal knowledge of many of these facts, as outlined in the preceding
13 paragraphs 1 through 5. Even if he did not, Rimini offers Mr. Hilliard as an expert under Fed. R.
14 Civ. P. 703, and he may thus testify to facts he has been made aware of, even if he lacks personal
15 knowledge of those facts. Fed. R. Evid. 703 ("An expert may base an opinion on facts or data in the
16 case that the expert *has been made aware of* or personally observed.") (emphasis added). This
17 evidence need not be admissible at trial for Mr. Hilliard to rely upon it, *see* Fed. R. Civ. P. 703, but
18 Rimini nonetheless anticipates that it would present sworn testimony and/or authenticated
19 documents sufficient to establish the admissibility of these facts.

20 Finally, as explained by his declaration, Mr. Hilliard is an industry expert who has negotiated
21 and interpreted hundreds of licenses similar to those at-issue. His testimony is thus "relevant and
22 admissible to expose the latent ambiguity in the contract language regarding the industry's
23 customary usage," as well as to interpreting any ambiguities. *Wolf*, 8 Cal. Rptr. 3d at 659 (holding
24 that an expert with experience negotiating and reviewing contracts may testify regarding the industry
25 and accepted meanings of ambiguous contract language).

26 **Declaration Paragraph 7:**

1 Due to different customer's unique business needs and because of changes in business
2 conditions and regulatory requirements (including such things as payroll taxes), many users of such
3 enterprise software products have never found it feasible to use them without some level of
4 customizations and/or periodic updates. To allow such customizations and updating (among other
5 reasons), most major ERP software developers (including Oracle) routinely grant their customers
6 access to some or all of the source code for the licensed applications to allow for these needed
7 customer modifications. Nonetheless, source code access of this nature is not typically required for
8 many other common software support activities. In particular, it is not required when either (a)
9 installing the ERP software (prior to any modifications being made) or (b) copying the software in
10 accordance with the allowed copying specified in the ERP software license.

11 **Oracle's Objections:**

12 Oracle objects that this paragraph is irrelevant, is inadmissible parol evidence, does not
13 demonstrate personal knowledge, does not demonstrate any reliable factual basis for Mr. Hilliard to
14 offer as expert opinions, and is inadmissible legal conclusion.

15 **Rimini's Response:**

16 This paragraph is relevant to "the circumstances in which a contract was written, the
17 subsequent conduct of the parties, and the common usage of particular terms in a given industry."
18 *Miller v. Glenn Miller Prods., Inc.*, 454 F. 3d 975, 989 (9th Cir. 2006). It is reversible error not to
19 consider extrinsic evidence of industry custom. *Wolf v. Superior Court*, 8 Cal. Rptr. 3d 649, 655-56
20 (Cal. App. 2004).

21 "The exception to the parol evidence rule is broad – extrinsic evidence is admissible to
22 demonstrate that there is an ambiguity in an instrument and for the purpose of construing this
23 ambiguity." *Adobe Sys.*, 84 F. Supp. 2d at 1090; *see also Welles v. Turner Entm't Co.*, 503 F.3d
24 728, 737 (9th Cir. 2007). It is error not to consider extrinsic evidence in interpreting a contract –
25 *even if* the Court determines that the contract appears unambiguous on its face. *Wolf*, 8 Cal. Rptr. 3d
26 at 655-56 (Cal. App. 2004). This is true "even if a contract appears unambiguous on its face."

1 *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal. App. 1998); *Ermolieff v. R.K.O. Radio Pictures,*
2 *Inc.*, 19 Cal.2d 543, 550, 122 P.2d 3 (Cal. 1942).

3 Mr. Hilliard has personal knowledge of many of these facts, as outlined in the preceding
4 paragraphs. But even if he did not Mr. Hilliard is offered as an expert under Fed. R. Civ. P. 703, and
5 he may thus testify to facts he has been made aware of, even if he lacks personal knowledge of those
6 facts. Fed. R. Evid. 703. This evidence need not be admissible at trial for Mr. Hilliard to rely upon
7 it, *see Fed. R. Civ. P. 703*, but Rimini nonetheless anticipates that it would present sworn testimony
8 and/or authenticated documents sufficient to establish the admissibility of these facts.

9 Further, Mr. Hilliard is an industry expert who has negotiated and interpreted hundreds of
10 licenses similar to those-at-issue, and his testimony is thus relevant and admissible to expose any
11 latent ambiguities in the contract and in interpreting those ambiguities. *Wolf*, 8 Cal. Rptr. 3d at 659
12 (holding that an expert with experience negotiating and reviewing contracts within an industry may
13 testify regarding the industry and accepted meanings of ambiguous contract language). An expert's
14 opinions for accepted meanings within an industry are admissible, and do not constitute improper
15 legal conclusions. *See Wolf*, 8 Cal. Rptr. 3d at 659.

16 **Declaration Paragraph 8:**

17 Instead of requiring all their customers to make the changes needed to comply with these
18 necessary changes themselves, ERP software developers began offering support contracts to their
19 customers covering software updates needed to stay current and also including repairs to any defects
20 that might be uncovered. This practice created new problems for the major software developers,
21 however, because once the customers had modified the software to meet their individual
22 requirements, the regular updates and repairs that the developers produce, test and release
23 periodically for the standard versions of the software might no longer work properly with the
24 modified versions of the software in use in their customers' businesses.

25 **Oracle's Objections:**

1 Oracle objects that this paragraph is irrelevant, is inadmissible parol evidence, does not
2 demonstrate personal knowledge, does not demonstrate any reliable factual basis for Mr. Hilliard to
3 offer as expert opinions, and is inadmissible legal conclusion.

4 **Rimini's Response:**

5 This paragraph is relevant to "the circumstances in which a contract was written, the
6 subsequent conduct of the parties, and the common usage of particular terms in a given industry."
7 *Miller v. Glenn Miller Prods., Inc.*, 454 F. 3d 975, 989 (9th Cir. 2006).

8 The exception to the parol evidence rule is broad in California. *Welles v. Turner Entm't Co.*,
9 503 F.3d 728, 737 (9th Cir. 2007). It is error not to consider extrinsic evidence in interpreting a
10 contract – *even if* the Court determines that the contract appears unambiguous on its face. *Wolf*, 8
11 Cal. Rptr. 3d at 655-56 (Cal. App. 2004). This is true "even if a contract appears unambiguous on its
12 face." *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal. App. 1998); *Ermolieff v. R.K.O. Radio*
13 *Pictures, Inc.*, 19 Cal.2d 543, 550, 122 P.2d 3 (Cal. 1942).

14 Mr. Hilliard has personal knowledge of many of these facts, as outlined in the preceding
15 paragraphs. But even if he did not Mr. Hilliard is offered as an expert under Fed. R. Civ. P. 703, and
16 he may thus testify to facts he has been made aware of, even if he lacks personal knowledge of those
17 facts. Fed. R. Evid. 703. This evidence need not be admissible at trial for Mr. Hilliard to rely upon
18 it, *see Fed. R. Civ. P. 703*, but Rimini nonetheless anticipates that it would present sworn testimony
19 and/or authenticated documents sufficient to establish the admissibility of these facts.

20 Further, Mr. Hilliard is an industry expert who has negotiated and interpreted hundreds of
21 licenses similar to those-at-issue, and his testimony is thus relevant and admissible to expose any
22 latent ambiguities in the contract and in interpreting those ambiguities. *Wolf*, 8 Cal. Rptr. 3d at 659
23 (holding that an expert with experience negotiating and reviewing contracts within an industry may
24 testify regarding the industry and accepted meanings of ambiguous contract language). An expert's
25 opinions for accepted meanings within an industry are admissible, and do not constitute improper
26 legal conclusions. *See Wolf*, 8 Cal. Rptr. 3d at 659.

1 **Declaration Paragraph 9:**

2 To address the needs of their clients, all of the major software developers began offering
3 consulting and programming services so that customers that did not want to use their own employees
4 for customization and modification could contract out these services. Additionally, the major ERP
5 software developers, including SAP, Microsoft, Oracle, PeopleSoft, J.D. Edwards and Siebel, began
6 referring existing and prospective licensees to third party consultants and consulting firms to: market
7 their enterprise applications software products; install and configure the software; make custom
8 modifications if needed; develop customized add-on functionality needed to meet requirements of
9 specific industries; and provide ongoing support for such modifications when the changes rendered
10 them ineligible for standard support from the developer itself.

11 **Oracle's Objections:**

12 Oracle objects that this paragraph is irrelevant, is inadmissible parol evidence, does not
13 demonstrate personal knowledge, does not demonstrate any reliable factual basis for Mr. Hilliard to
14 offer as expert opinions, and is inadmissible legal conclusion.

15 **Rimini's Response:**

16 This paragraph is relevant to "the circumstances in which a contract was written, the
17 subsequent conduct of the parties, and the common usage of particular terms in a given industry."
18 *Miller v. Glenn Miller Prods., Inc.*, 454 F. 3d 975, 989 (9th Cir. 2006).

19 The exception to the parol evidence rule is broad in California. *Welles v. Turner Entm't Co.*,
20 503 F.3d 728, 737 (9th Cir. 2007). It is error not to consider extrinsic evidence in interpreting a
21 contract – *even if* the Court determines that the contract appears unambiguous on its face. *Wolf*, 8
22 Cal. Rptr. 3d at 655-56 (Cal. App. 2004). This is true "even if a contract appears unambiguous on its
23 face." *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal. App. 1998); *Ermolieff v. R.K.O. Radio*
24 *Pictures, Inc.*, 19 Cal.2d 543, 550, 122 P.2d 3 (Cal. 1942).

25 Mr. Hilliard has personal knowledge of many of these facts, as outlined in the preceding
26 paragraphs. But even if he did not Mr. Hilliard is offered as an expert under Fed. R. Civ. P. 703, and
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1 he may thus testify to facts he has been made aware of, even if he lacks personal knowledge of those
2 facts. Fed. R. Evid. 703. This evidence need not be admissible at trial for Mr. Hilliard to rely upon
3 it, *see Fed. R. Civ. P. 703*, but Rimini nonetheless anticipates that it would present sworn testimony
4 and/or authenticated documents sufficient to establish the admissibility of these facts.

5 Further, Mr. Hilliard is an industry expert who has negotiated and interpreted hundreds of
6 licenses similar to those-at-issue, and his testimony is thus relevant and admissible to expose any
7 latent ambiguities in the contract and in interpreting those ambiguities. *Wolf*, 8 Cal. Rptr. 3d at 659
8 (holding that an expert with experience negotiating and reviewing contracts within an industry may
9 testify regarding the industry and accepted meanings of ambiguous contract language). An expert's
10 opinions for accepted meanings within an industry are admissible, and do not constitute improper
11 legal conclusions. *See Wolf*, 8 Cal. Rptr. 3d at 659.

12 **Declaration Paragraph 10:**

13 By the early 1990s, a service industry emerged consisting of independent consultants,
14 programmers and consulting firms that had developed specific implementation and support expertise
15 for each of the major developers' products. One portion of this industry includes the developers'
16 designated "business partners", and every major enterprise software developer (including Oracle) set
17 up official business partner networks. The software developers, including Oracle, rely upon these
18 networks of business partners to implement, customize and otherwise support its ERP licensees.
19 Licensees often engage third parties to implement, customize and otherwise support the software, as
20 they often lack the requisite inhouse resources. Over the past 30 years, I have worked with dozens of
21 clients that have implemented enterprise software systems, including Oracle, PeopleSoft and J.D.
22 Edwards, and that acquired these systems through third party consultants and/or engaged such
23 consultants for the implementation and on-going services in conjunction with these systems.

24 **Oracle's Objections:**

1 Oracle objects that this paragraph is irrelevant, is inadmissible parol evidence, does not
2 demonstrate personal knowledge, does not demonstrate any reliable factual basis for Mr. Hilliard to
3 offer as expert opinions, and is inadmissible legal conclusion.

4 **Rimini's Response:**

5 This paragraph is relevant to "the circumstances in which a contract was written, the
6 subsequent conduct of the parties, and the common usage of particular terms in a given industry."
7 *Miller v. Glenn Miller Prods., Inc.*, 454 F. 3d 975, 989 (9th Cir. 2006). It is also relevant to Mr.
8 Hilliard's "knowledge, skill, experience, training, or education," which is relevant to establishing
9 that "the affiant is competent to give an expert opinion" in this case. *Walton v. U.S. Marshals Serv.*,
10 492 F.3d 998, 1008 (9th Cir. 2007); Fed. R. Evid. 702

11 The exception to the parol evidence rule is broad in California. *Welles v. Turner Entm't Co.*,
12 503 F.3d 728, 737 (9th Cir. 2007). It is error not to consider extrinsic evidence in interpreting a
13 contract – *even if* the Court determines that the contract appears unambiguous on its face. *Wolf*, 8
14 Cal. Rptr. 3d at 655-56 (Cal. App. 2004). This is true "even if a contract appears unambiguous on its
15 face." *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal. App. 1998); *Ermolieff v. R.K.O. Radio*
16 *Pictures, Inc.*, 19 Cal.2d 543, 550, 122 P.2d 3 (Cal. 1942).

17 Mr. Hilliard has personal knowledge of many of these facts, as outlined in the preceding
18 paragraphs. But even if he did not Mr. Hilliard is offered as an expert under Fed. R. Civ. P. 703, and
19 he may thus testify to facts he has been made aware of, even if he lacks personal knowledge of those
20 facts. Fed. R. Evid. 703. This evidence need not be admissible at trial for Mr. Hilliard to rely upon
21 it, *see Fed. R. Civ. P. 703*, but Rimini nonetheless anticipates that it would present sworn testimony
22 and/or authenticated documents sufficient to establish the admissibility of these facts.

23 Further, Mr. Hilliard is an industry expert who has negotiated and interpreted hundreds of
24 licenses similar to those-at-issue, and his testimony is thus relevant and admissible to expose any
25 latent ambiguities in the contract and in interpreting those ambiguities. *Wolf*, 8 Cal. Rptr. 3d at 659
26 (holding that an expert with experience negotiating and reviewing contracts within an industry may
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1 testify regarding the industry and accepted meanings of ambiguous contract language). An expert's
2 opinions for accepted meanings within an industry are admissible, and do not constitute improper
3 legal conclusions. *See Wolf*, 8 Cal. Rptr. 3d at 659.

4 **Declaration Paragraph 11:**

5 Enterprise software support — whether done by the developers of the software, licensees of
6 the software, or consultants engaged by the licensees — requires the creation of multiple non-
7 production copies of the software applications being supported. Oracle's technical documentation
8 relating to software copies reflects these normal and customary industry practices and encourages its
9 licensees to create multiple copies of its software environments. [REDACTED]

10 [REDACTED]
11 [REDACTED] Likewise,
12 Oracle further explains, "Throughout the implementation process, your testers need to constantly test
13 the application to make sure that it performs properly. Your team would also be constantly migrating
14 configuration changes from development to test to staging environments. Ultimately, when you are
15 ready to go live with your PeopleSoft applications, your administrators would deploy your tested
16 configuration from staging to production environment." Ex. 24 (ORCLRS0811822, at
17 ORCLRS0811824). As reflected by these documents, the maintenance of non-production software
18 copies (e.g., for development, testing, archival, disaster recovery, troubleshooting and other support
19 purposes) is the normal and customary practice in the industry and, in my experience of reviewing
20 hundreds of enterprise software licenses, there are seldom (if ever) any contractual limits on the
21 number of non-production copies that licensees can maintain. [REDACTED]

22 [REDACTED]
23 [REDACTED]
24 **Oracle's Objections:**
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1 Oracle objects that this paragraph is irrelevant, is inadmissible parol evidence, does not
2 demonstrate personal knowledge, does not demonstrate any reliable factual basis for Mr. Hilliard to
3 offer as expert opinions, and is inadmissible legal conclusion.

4 **Rimini's Response:**

5 This paragraph is relevant to "the circumstances in which a contract was written, the
6 subsequent conduct of the parties, and the common usage of particular terms in a given industry."
7 *Miller v. Glenn Miller Prods., Inc.*, 454 F. 3d 975, 989 (9th Cir. 2006).

8 The exception to the parol evidence rule is broad in California. *Welles v. Turner Entm't Co.*,
9 503 F.3d 728, 737 (9th Cir. 2007). It is error not to consider extrinsic evidence in interpreting a
10 contract – *even if* the Court determines that the contract appears unambiguous on its face. *Wolf*, 8
11 Cal. Rptr. 3d at 655-56 (Cal. App. 2004). This is true "even if a contract appears unambiguous on its
12 face." *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal. App. 1998); *Ermolieff v. R.K.O. Radio*
13 *Pictures, Inc.*, 19 Cal.2d 543, 550, 122 P.2d 3 (Cal. 1942).

14 Mr. Hilliard has personal knowledge of many of these facts, as outlined in the preceding
15 paragraphs. But even if he did not Mr. Hilliard is offered as an expert under Fed. R. Civ. P. 703, and
16 he may thus testify to facts he has been made aware of, even if he lacks personal knowledge of those
17 facts. Fed. R. Evid. 703. This evidence need not be admissible at trial for Mr. Hilliard to rely upon
18 it, *see Fed. R. Civ. P. 703*, but Rimini nonetheless anticipates that it would present sworn testimony
19 and/or authenticated documents sufficient to establish the admissibility of these facts.

20 Further, Mr. Hilliard is an industry expert who has negotiated and interpreted hundreds of
21 licenses similar to those-at-issue, and his testimony is thus relevant and admissible to expose any
22 latent ambiguities in the contract and in interpreting those ambiguities. *Wolf*, 8 Cal. Rptr. 3d at 659
23 (holding that an expert with experience negotiating and reviewing contracts within an industry may
24 testify regarding the industry and accepted meanings of ambiguous contract language). An expert's
25 opinions for accepted meanings within an industry are admissible, and do not constitute improper
26 legal conclusions. *See Wolf*, 8 Cal. Rptr. 3d at 659.

1 **Declaration Paragraph 12 & nn. 1-2:**

2 When engaged, consultants likewise create and rely on non-production copies of the software
3 to provide services in connection with the licensees' use of the software. For example, development
4 of custom modifications to prior code has historically occurred on computers maintained by the
5 consultants with development occurring both in, and outside of, the United States. The motivation to
6 have this work performed offsite (for purposes of convenience and cost, among others) remains
7 similar today as when it first began in the early 1990s. In particular, the normal and customary way
8 that a professional software development organization (such as a consulting organization) modifies
9 and updates a customer's software is to create non-production copies of the software on the
10 consultant's computer systems, such that the non-production versions of the software can be
11 maintained and modified as needed. Oracle acknowledges that companies often "copy production
12 data into staging or test environments to allow in-house developers or offshore testers to perform
13 application development and application testing." Ex. 27 (ORCLRS0811866-72) at
14 ORCLRS0811870. Oracle's website explains that it is "normal" for a single production instance of
15 Oracle ERP software "to have ten or more corresponding test or development instance copies for use
16 by several different teams of developers or departments." [FOOTNOTE 1] In fact, Oracle provides
17 its licensees tools to facilitate remote development work. [FOOTNOTE 2]

18 FOOTNOTE 1: Mask Your Secrets Using Oracle Enterprise Manager,
19 <http://www.oracle.com/technetwork/articles/oem/havewala-datamasking-grid-166436.html> (last
20 visited April 20, 2012) (discussing data confidentiality concerns that should addressed "before
21 providing an off-site or development copy of the database.").

22 FOOTNOTE 2: Masking Sensitive Data,
23 http://docs.oracle.com/cd/E1188201/server.112/e16540/tdm_data_masking.htm (last visited
24 April 20, 2012) (describing a data obscuration tool that allows for test data to be shared with
25 "external business partners such as offshore testing companies").

26 **Oracle's Objections:**

1 Oracle objects that this paragraph is irrelevant, is inadmissible parol evidence, does not
2 demonstrate personal knowledge, does not demonstrate any reliable factual basis for Mr. Hilliard to
3 offer as expert opinions, and is inadmissible legal conclusion.

4 **Rimini's Response:**

5 This paragraph is relevant to "the circumstances in which a contract was written, the
6 subsequent conduct of the parties, and the common usage of particular terms in a given industry."
7 *Miller v. Glenn Miller Prods., Inc.*, 454 F. 3d 975, 989 (9th Cir. 2006).

8 The exception to the parol evidence rule is broad in California. *Welles v. Turner Entm't Co.*,
9 503 F.3d 728, 737 (9th Cir. 2007). It is error not to consider extrinsic evidence in interpreting a
10 contract – *even if* the Court determines that the contract appears unambiguous on its face. *Wolf*, 8
11 Cal. Rptr. 3d at 655-56 (Cal. App. 2004). This is true "even if a contract appears unambiguous on its
12 face." *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal. App. 1998); *Ermolieff v. R.K.O. Radio*
13 *Pictures, Inc.*, 19 Cal.2d 543, 550, 122 P.2d 3 (Cal. 1942).

14 Mr. Hilliard has personal knowledge of many of these facts, as outlined in the preceding
15 paragraphs. But even if he did not Mr. Hilliard is offered as an expert under Fed. R. Civ. P. 703, and
16 he may thus testify to facts he has been made aware of, even if he lacks personal knowledge of those
17 facts. Fed. R. Evid. 703. This evidence need not be admissible at trial for Mr. Hilliard to rely upon
18 it, *see Fed. R. Civ. P. 703*, but Rimini nonetheless anticipates that it would present sworn testimony
19 and/or authenticated documents sufficient to establish the admissibility of these facts.

20 Further, Mr. Hilliard is an industry expert who has negotiated and interpreted hundreds of
21 licenses similar to those-at-issue, and his testimony is thus relevant and admissible to expose any
22 latent ambiguities in the contract and in interpreting those ambiguities. *Wolf*, 8 Cal. Rptr. 3d at 659
23 (holding that an expert with experience negotiating and reviewing contracts within an industry may
24 testify regarding the industry and accepted meanings of ambiguous contract language). An expert's
25 opinions for accepted meanings within an industry are admissible, and do not constitute improper
26 legal conclusions. *See Wolf*, 8 Cal. Rptr. 3d at 659.

Declaration Paragraph 13 & n. 3:

Further, several Oracle Partners acknowledge and promote the fact that they follow this industry custom when providing services to Oracle licensees. [REDACTED]

[REDACTED] Further, Astute Business Solutions, eVerge Group, CedarCrestone, and Summit Technology, all Oracle Partners, advertise on their websites the use of an "upgrade lab" on the consultant's computer systems wherein the licensee's environment is replicated and used to provide services to the licensee. [FOOTNOTE 3] As one Oracle Partner explains, "Our PeopleSoft Center of Excellence hosts and manages an 'Upgrade Lab' which replicates the client environment at our offshore locations. The initial and most time consuming activities are carried out in our Upgrade Lab thus benefiting the clients with immense cost savings." Ex. 32.

FOOTNOTE 3: See Exhibits 32 to 35, which are true and correct copies of the web pages indicated below.

Ex. 32, Astute Business Solutions, Astute Labs

http://www.beastute.com/index.php?option=com_content&view=article&id=76&Itemid=191, (last visited April 20, 2012) ("Our PeopleSoft Center of Excellence hosts and manages an 'Upgrade Lab' which replicates the client environment at our offshore locations. The initial and most time consuming activities are carried out in our Upgrade Lab thus benefiting the clients with immense cost savings.");

Ex. 33, CedarCrestone, Inc., CedarCrestone PeopleSoft Upgrades,

<http://www.cedarcrestone.com/media/documents/PSUpgrades.pdf> (last visited April 20, 2012) ("CedarCrestone also offers a more stream-lined and cost-effective Upgrade Lab Solution, using [CedarCrestone's] state-of-the-art data center.");

Ex. 34, eVerge Group, Inc., PeopleSoft ERP Upgrades,

1 http://www.evergroup.com/software_upgrades.htm (last visited April 20, 2012) (“eVerge
2 Group technical staff will copy the client database to external media for transport to the eVerge
3 Group upgrade lab.”).

4 Ex. 35, Summit Technology, Inc., PeopleSoft Upgrades,
5 <http://www.summitsti.com/services/peoplesoft-upgrades> (last visited April 20, 2012) (“By
6 taking advantage of an off-site [PeopleSoft] upgrade, we can manage your project in effective
7 manner, because you can concentrate your efforts on your core business, and let us handle your
8 upgrade in our state-of-the-art upgrade lab.”).

9 **Oracle’s Objections:**

10 Oracle objects that this paragraph is irrelevant, is inadmissible parol evidence, does not
11 demonstrate personal knowledge, is hearsay, is insufficiently authenticated, does not demonstrate
12 any reliable factual basis for Mr. Hilliard to offer as expert opinions, and is inadmissible legal
13 conclusion.

14 **Rimini’s Response:**

15 This paragraph is relevant to “the circumstances in which a contract was written, the
16 subsequent conduct of the parties, and the common usage of particular terms in a given industry.”
17 *Miller v. Glenn Miller Prods., Inc.*, 454 F. 3d 975, 989 (9th Cir. 2006).

18 The exception to the parol evidence rule is broad in California. *Welles v. Turner Entm’t Co.*,
19 503 F.3d 728, 737 (9th Cir. 2007). It is error not to consider extrinsic evidence in interpreting a
20 contract – *even if* the Court determines that the contract appears unambiguous on its face. *Wolf*, 8
21 Cal. Rptr. 3d at 655-56 (Cal. App. 2004). This is true “even if a contract appears unambiguous on its
22 face.” *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal. App. 1998); *Ermolieff v. R.K.O. Radio*
23 *Pictures, Inc.*, 19 Cal.2d 543, 550, 122 P.2d 3 (Cal. 1942).

24 Mr. Hilliard has personal knowledge of many of these facts. But even if he did not, Mr.
25 Hilliard is offered as an expert under Fed. R. Civ. P. 703, and he may thus testify to facts he has been
26 made aware of, even if he lacks personal knowledge of those facts. Fed. R. Evid. 703. This

1 evidence need not be admissible at trial for Mr. Hilliard to rely upon it, *see Fed. R. Civ. P. 703*, but
2 Rimini nonetheless anticipates that it would present sworn testimony and/or authenticated
3 documents sufficient to establish the admissibility of these facts.

4 This paragraph is not hearsay. Mr. Simmons' deposition testimony is admissible, and even
5 so Rimini may call Mr. Simmons at trial and/or offer his deposition testimony under Fed. R. Evid.
6 804(b)(1). Exhibits 32-35 are not hearsay either, for they are offered as evidence that Oracle
7 partners "acknowledge and promote" an industry custom, not for the truth that they actually provide
8 it in the manner stated. Regardless, Mr. Hilliard is being offered as an expert witness and he thus
9 may rely on hearsay evidence in forming his opinions. *See Fed. R. Evid. 703*. Finally, to the extent
10 the exhibits contain inadmissible hearsay, Rimini intends to authenticate them at trial through
11 competent testimony.

12 Regarding the admissibility of Mr. Hilliard's testimony itself, Mr. Hilliard is an industry
13 expert who has negotiated and interpreted hundreds of licenses similar to those-at-issue, and his
14 testimony is thus relevant and admissible to expose any latent ambiguities in the contract and in
15 interpreting those ambiguities. *Wolf*, 8 Cal. Rptr. 3d at 659 (holding that an expert with experience
16 negotiating and reviewing contracts within an industry may testify regarding the industry and
17 accepted meanings of ambiguous contract language). An expert's opinions for accepted meanings
18 within an industry are admissible, and do not constitute improper legal conclusions. *See Wolf*, 8 Cal.
19 Rptr. 3d at 659.

20 **Declaration Paragraph 14:**

21 To provide their implementation and support services in an efficient and cost effective
22 manner, third party consulting firms typically use the non-production copies of the software
23 applications on their systems to develop the fixes and enhancements that they subsequently
24 distribute to the licensed software users they support. Further, it is fully consistent with the customs
25 and practices in the software industry for such consulting firm to provide cloned portions of
26 applications software and updates to other customers licensed for the same underlying software. [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 This practice by consultants reflects the fact that it is the actual ERP software that is licensed, not the
5 media or a particular embodiment of the software. ERP software vendors customarily afford their
6 clients non-exclusive, perpetual, limited licenses to use the licensed software programs, while
7 granting multiple clients license rights to the same intellectual property. Therefore, the industry
8 practice of providing multiple clients updates or fixes created in a single development environment
9 permits efficient and cost effective development, while reflecting the practice of the software
10 vendors to license the same software to multiple clients. [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 **Oracle's Objections:**

15 Oracle objects that this paragraph is irrelevant, is inadmissible parol evidence, does not
16 demonstrate personal knowledge, is hearsay, does not demonstrate any reliable factual basis for Mr.
17 Hilliard to offer as expert opinions, and is inadmissible legal conclusion.

18 **Rimini's Response:**

19 This paragraph is relevant to "the circumstances in which a contract was written, the
20 subsequent conduct of the parties, and the common usage of particular terms in a given industry."
21 *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 989 (9th Cir. 2006).

22 The exception to the parol evidence rule is broad in California. *Welles v. Turner Entm't Co.*,
23 503 F.3d 728, 737 (9th Cir. 2007). It is error not to consider extrinsic evidence in interpreting a
24 contract – *even if* the Court determines that the contract appears unambiguous on its face. *Wolf*, 8
25 Cal. Rptr. 3d at 655-56 (Cal. App. 2004). This is true "even if a contract appears unambiguous on its
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1 face.” *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal. App. 1998); *Ermolieff v. R.K.O. Radio*
2 *Pictures, Inc.*, 19 Cal.2d 543, 550, 122 P.2d 3 (Cal. 1942).

3 Mr. Hilliard has personal knowledge of many of these facts, as outlined in the preceding
4 paragraphs. But even if he did not Mr. Hilliard is offered as an expert under Fed. R. Civ. P. 703, and
5 he may thus testify to facts he has been made aware of, even if he lacks personal knowledge of those
6 facts. Fed. R. Evid. 703. This evidence need not be admissible at trial for Mr. Hilliard to rely upon
7 it, *see Fed. R. Civ. P. 703*, but Rimini nonetheless anticipates that it would present sworn testimony
8 and/or authenticated documents sufficient to establish the admissibility of these facts.

9 This paragraph is not hearsay. Mr. Simmons’ deposition testimony is admissible, and even
10 so Rimini may call Mr. Simmons at trial and/or offer his deposition testimony under Fed. R. Evid.
11 804(b)(1). Regardless, Mr. Hilliard is being offered as an expert witness and he thus may rely on
12 hearsay evidence in forming his opinions. *See Fed. R. Evid. 703*.

13 Regarding the admissibility of Mr. Hilliard’s testimony itself, Mr. Hilliard is an industry
14 expert who has negotiated and interpreted hundreds of licenses similar to those-at-issue, and his
15 testimony is thus relevant and admissible to expose any latent ambiguities in the contract and in
16 interpreting those ambiguities. *Wolf*, 8 Cal. Rptr. 3d at 659 (holding that an expert with experience
17 negotiating and reviewing contracts within an industry may testify regarding the industry and
18 accepted meanings of ambiguous contract language). An expert’s opinions for accepted meanings
19 within an industry are admissible, and do not constitute improper legal conclusions. *See Wolf*, 8 Cal.
20 Rptr. 3d at 659.

21 **Declaration Paragraph 15:**

22 I understand that Oracle has taken issue with Rimini’s practices of (a) maintaining local non-
23 production copies of Oracle ERP software for its clients, (b) providing cloned portions of
24 applications software to customers licensed for that software, and (c) using one copy of a
25 development environment to create PeopleSoft updates that are ultimately delivered to multiple
26 clients. As explained in the preceding paragraphs, such practices and procedures are similar to other
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1 leading consulting firms and follow generally accepted practices in the industry. Thus, Rimini's
 2 practices are essentially similar to those of other contractors that provide software consulting
 3 services and there is no reason to distinguish it from other such contractors.

4 **Oracle's Objections:**

5 Oracle objects that this paragraph is irrelevant, is inadmissible parol evidence, does not
 6 demonstrate personal knowledge, does not demonstrate any reliable factual basis for Mr. Hilliard to
 7 offer as expert opinions, and is inadmissible legal conclusion.

8 **Rimini's Response:**

9 This paragraph is relevant to "the circumstances in which a contract was written, the
 10 subsequent conduct of the parties, and the common usage of particular terms in a given industry."
 11 *Miller v. Glenn Miller Prods., Inc.*, 454 F. 3d 975, 989 (9th Cir. 2006).

12 The exception to the parol evidence rule is broad in California. *Welles v. Turner Entm't Co.*,
 13 503 F.3d 728, 737 (9th Cir. 2007). It is error not to consider extrinsic evidence in interpreting a
 14 contract – *even if* the Court determines that the contract appears unambiguous on its face. *Wolf*, 8
 15 Cal. Rptr. 3d at 655-56 (Cal. App. 2004). This is true "even if a contract appears unambiguous on its
 16 face." *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal. App. 1998); *Ermolieff v. R.K.O. Radio*
 17 *Pictures, Inc.*, 19 Cal.2d 543, 550, 122 P.2d 3 (Cal. 1942).

18 Mr. Hilliard has personal knowledge of many of these facts. But even if he did not Mr.
 19 Hilliard is offered as an expert under Fed. R. Civ. P. 703, and he may thus testify to facts that he is
 20 aware of or has been made aware of, even if he lacks personal knowledge of those facts. Fed. R.
 21 Evid. 703. This evidence need not be admissible at trial for Mr. Hilliard to rely upon it, *see Fed. R.*
 22 *Civ. P. 703*, but Rimini nonetheless anticipates that it would present sworn testimony and/or
 23 authenticated documents sufficient to establish the admissibility of these facts.

24 Regarding the admissibility of Mr. Hilliard's testimony itself, Mr. Hilliard is an industry
 25 expert who has negotiated and interpreted hundreds of licenses similar to those-at-issue, and his
 26 testimony is thus relevant and admissible to expose any latent ambiguities in the contract and in

1 interpreting those ambiguities. *Wolf*, 8 Cal. Rptr. 3d at 659 (holding that an expert with experience
2 negotiating and reviewing contracts within an industry may testify regarding the industry and
3 accepted meanings of ambiguous contract language). An expert's opinions for accepted meanings
4 within an industry are admissible, and do not constitute improper legal conclusions. *See Wolf*, 8 Cal.
5 Rptr. 3d at 659.

6 **Declaration Paragraph 16:**

7 I also understand that Oracle has taken issue with Rimini's creation of RAM copies of
8 Oracle's software. As explained below, this contention is not supportable because the right to make
9 RAM copies of software and software environments is implicit in any license grant directed to
10 providing access or use of such software and its supporting environments. Otherwise, the right to
11 access and use the software would be ineffective and pointless because there is no way to actually
12 carry out such access or use (here for non-production purposes) without having at least a portion of
13 the software copied into RAM. For this reason, it is widely understood in the industry (and common
14 practice) that license rights directed to the access and use of the software also implicitly include the
15 right to make RAM copies of the software.

16 **Oracle's Objections:**

17 Oracle objects that this paragraph is irrelevant, is inadmissible parol evidence, does not
18 demonstrate personal knowledge, does not demonstrate any reliable factual basis for Mr. Hilliard to
19 offer as expert opinions, and is inadmissible legal conclusion.

20 **Rimini's Response:**

21 This paragraph is relevant to the existence of latent ambiguities within the licenses-at-issue.
22 *Wolf v. Superior Court*, 8 Cal. Rptr. 3d 649, 655-56 (Cal. App. 2004). It is reversible error not to
23 consider such extrinsic evidence. *Id.*

24 The exception to the parol evidence rule is broad in California. *Welles v. Turner Entm't Co.*,
25 503 F.3d 728, 737 (9th Cir. 2007). It is error not to consider extrinsic evidence in interpreting a
26 contract – *even if* the Court determines that the contract appears unambiguous on its face. *Wolf*, 8
27
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1 Cal. Rptr. 3d at 655-56 (Cal. App. 2004). This is true “even if a contract appears unambiguous on its
 2 face.” *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal. App. 1998); *Ermolieff v. R.K.O. Radio*
 3 *Pictures, Inc.*, 19 Cal.2d 543, 550, 122 P.2d 3 (Cal. 1942).

4 Mr. Hilliard has personal knowledge of these facts. But even if he did not Mr. Hilliard is
 5 offered as an expert under Fed. R. Civ. P. 703, and he may thus testify to facts he is aware of or has
 6 been made aware of, even if he lacks personal knowledge of those facts. Fed. R. Evid. 703. This
 7 evidence need not be admissible at trial for Mr. Hilliard to rely upon it, *see Fed. R. Civ. P. 703*, but
 8 Rimini nonetheless anticipates that it would present sworn testimony and/or authenticated
 9 documents sufficient to establish the admissibility of these facts.

10 Regarding the admissibility of Mr. Hilliard’s testimony itself, Mr. Hilliard is an industry
 11 expert who has negotiated and interpreted hundreds of licenses similar to those-at-issue, and his
 12 testimony is thus relevant and admissible to expose any latent ambiguities in the contract and in
 13 interpreting those ambiguities. *Wolf*, 8 Cal. Rptr. 3d at 659 (holding that an expert with experience
 14 negotiating and reviewing contracts within an industry may testify regarding the industry and
 15 accepted meanings of ambiguous contract language). An expert’s opinions for accepted meanings
 16 within an industry are admissible, and do not constitute improper legal conclusions. *See Wolf*, 8 Cal.
 17 Rptr. 3d at 659.

18 19 **III. EXHIBITS 3, 4, 9, 29 AND 30 TO THE RECKERS DECLARATION**

20 **Exhibit 3:**

21 Exhibit 3 contains excerpts from the deposition of Paul Simmons.

22 **Oracle’s Objections:**

23 Oracle objects that this exhibit is irrelevant, is inadmissible parol evidence, and does not
 24 demonstrate any reliable factual basis for Mr. Simmons to offer an expert opinion.

25 **Rimini’s Response:**

1 This paragraph is relevant to “the circumstances in which a contract was written, the
2 subsequent conduct of the parties, and the common usage of particular terms in a given industry.”
3 *Miller v. Glenn Miller Prods., Inc.*, 454 F. 3d 975, 989 (9th Cir. 2006).

4 The exception to the parol evidence rule is broad in California. *Welles v. Turner Entm’t Co.*,
5 503 F.3d 728, 737 (9th Cir. 2007). It is error not to consider extrinsic evidence in interpreting a
6 contract – *even if* the Court determines that the contract appears unambiguous on its face. *Wolf*, 8
7 Cal. Rptr. 3d at 655-56 (Cal. App. 2004). This is true “even if a contract appears unambiguous on its
8 face.” *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal. App. 1998); *Ermolieff v. R.K.O. Radio*
9 *Pictures, Inc.*, 19 Cal.2d 543, 550, 122 P.2d 3 (Cal. 1942).

10 Mr. Simmons is not being offered by Rimini as an expert; his deposition testimony is based
11 on personal knowledge and is admissible.

12 **Exhibit 4:**

13 Exhibit 4 is an exhibit to the deposition of Paul Simmons.

14 **Oracle’s Objections:**

15 Oracle objects that this exhibit is irrelevant, is inadmissible parol evidence, is
16 unauthenticated, and is hearsay.

17 **Rimini’s Response:**

18 This paragraph is relevant to “the circumstances in which a contract was written, the
19 subsequent conduct of the parties, and the common usage of particular terms in a given industry.”
20 *Miller v. Glenn Miller Prods., Inc.*, 454 F. 3d 975, 989 (9th Cir. 2006).

21 The exception to the parol evidence rule is broad in California. *Welles v. Turner Entm’t Co.*,
22 503 F.3d 728, 737 (9th Cir. 2007). It is error not to consider extrinsic evidence in interpreting a
23 contract – *even if* the Court determines that the contract appears unambiguous on its face. *Wolf*, 8
24 Cal. Rptr. 3d at 655-56 (Cal. App. 2004). This is true “even if a contract appears unambiguous on its
25 face.” *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal. App. 1998); *Ermolieff v. R.K.O. Radio*
26 *Pictures, Inc.*, 19 Cal.2d 543, 550, 122 P.2d 3 (Cal. 1942).

1 This paragraph is not hearsay because it is being offered as evidence of industry custom and
2 usage, not for the truth of the content of the documents. Regardless, Rimini anticipates
3 authenticating this document at trial. Exhibit 4 “could be presented in an admissible form at trial,”
4 and this Court should consider the contents of Exhibit 29. *Fraser*, 342 F.3d at 1037.

5 **Exhibit 9:**

6 Exhibit 9 is a copy of Rimini’s service agreement with the City of Flint.

7 **Oracle’s Objections:**

8 Oracle objects that this exhibit is not the original document, is irrelevant, is inadmissible
9 parol evidence, is hearsay, and is insufficiently authenticated.

10 **Rimini’s Response:**

11 Exhibit 9 satisfies the original document requirements because its contents “accurately reflect
12 the information” of the executed contract. Fed. R. Evid. 1001(d). Regardless, Rimini anticipates
13 offering the original document at trial.

14 Exhibit 9 is relevant to Rimini’s compliance with the licenses-at-issue. Dkt. 269, Rimini
15 SOF 17 (filed under seal); Rimini’s Opp. at 11:18-23. Exhibit 9 is also relevant to construing the
16 City of Flint’s license with Oracle. *Adobe Sys.*, 84 F. Supp. 2d at 1090.

17 The exception to the parol evidence rule is broad in California. *Welles v. Turner Entm’t Co.*,
18 503 F.3d 728, 737 (9th Cir. 2007). It is error not to consider extrinsic evidence in interpreting a
19 contract – *even if* the Court determines that the contract appears unambiguous on its face. *Wolf*, 8
20 Cal. Rptr. 3d at 655-56 (Cal. App. 2004). This is true “even if a contract appears unambiguous on its
21 face.” *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal. App. 1998); *Ermolieff v. R.K.O. Radio*
22 *Pictures, Inc.*, 19 Cal.2d 543, 550, 122 P.2d 3 (Cal. 1942).

23 The document is not hearsay because it is not offered to prove the statement within the
24 document, but rather as evidence that Rimini and City of Flint entered into an agreement. Fed. R.
25 Evid. 801(c).

1 Rimini anticipates offering the testimony of either a representative of City of Flint or
2 Rimini's custodian of records at trial to provide additional foundation for Exhibit 9. Rimini can also
3 offer the deposition testimony of City of Flint representative Thomas O'Brien, which contains
4 statements regarding the authenticity and accuracy of Exhibit 9. Fed. R. Evid. 804(b)(1). Exhibit 9
5 "could be presented in an admissible form at trial," and this Court should consider the contents of
6 Exhibit 29. *Fraser*, 342 F.3d at 1037.

7 **Exhibit 29:**

8 Exhibit 29 is a copy of Rimini's service agreement with Giant Cement Holdings, Inc.

9 **Oracle's Objections:**

10 Oracle objects that this exhibit is inadmissible parol evidence, is hearsay, and is insufficiently
11 authenticated.

12 **Rimini's Response:**

13 The exception to the parol evidence rule is broad in California. It is error not to consider
14 extrinsic evidence in interpreting a contract – *even if* the Court determines that the contract appears
15 unambiguous on its face. *Wolf*, 8 Cal. Rptr. 3d at 655-56 (Cal. App. 2004). This is true "even if a
16 contract appears unambiguous on its face." *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal.
17 App. 1998); *Ermolieff v. R.K.O. Radio Pictures, Inc.*, 19 Cal.2d 543, 550, 122 P.2d 3 (Cal. 1942).

18 Exhibit 29 is not hearsay because Rimini does not offer it as proof of the contents of the
19 agreement. Rather, Rimini's offers it as evidence that Rimini and Giant Cement executed a
20 nondisclosure agreement. Fed. R. Evid. 801(c).

21 Finally, Rimini anticipates offering testimony of Rimini's custodian of records at trial to
22 authenticate the document and attest to its accuracy. If Rimini's custodian of records is unavailable
23 to testify, then Rimini will provide a declaration to authenticate Exhibit 29. Exhibit 29 "could be
24 presented in an admissible form at trial," and this Court should consider the contents of Exhibit 29.
25 *Fraser*, 342 F.3d at 1037.

26 **Exhibit 30:**

Exhibit 30 is a copy of Rimini's service agreement with the School District of Pittsburgh.

Oracle's Objections:

Oracle objects that this exhibit is not the original documents, is irrelevant, is inadmissible
parol evidence, is hearsay, and is insufficiently authenticated.

Rimini's Response:

Exhibit 30 satisfies the original document requirements because its contents "accurately
reflect the information" of the executed contract. Fed. R. Evid. 1001(d). Regardless, Rimini
anticipates offering the original document at trial.

Exhibit 30 is relevant to Rimini's compliance with the licenses-at-issue. Dkt. 269, Rimini
SOF 30; Rimini's Opp. at 18:26-19:4. Exhibit 30 is also relevant to construing the licenses-at-issue.
Adobe Sys., 84 F. Supp. 2d at 1090.

The exception to the parol evidence rule is broad in California. *Welles v. Turner Entm't Co.*,
503 F.3d 728, 737 (9th Cir. 2007). It is error not to consider extrinsic evidence in interpreting a
contract – *even if* the Court determines that the contract appears unambiguous on its face. *Wolf*, 8
Cal. Rptr. 3d at 655-56 (Cal. App. 2004). This is true "even if a contract appears unambiguous on its
face." *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (Cal. App. 1998); *Ermolieff v. R.K.O. Radio*
Pictures, Inc., 19 Cal.2d 543, 550, 122 P.2d 3 (Cal. 1942).

Exhibit 30 is not hearsay because Rimini does not offer it as proof of the contents of the
agreement. Rather, Rimini's offers it as evidence that Rimini and the School District of Pittsburgh
executed a nondisclosure agreement. Fed. R. Evid. 801(c).

Finally, Rimini anticipates offering testimony of Rimini's custodian of records at trial to
authenticate the document and attest to its accuracy. If Rimini's custodian of records is unavailable
to testify, then Rimini will provide a declaration to authenticate Exhibit 30. Exhibit 30 "could be
presented in an admissible form at trial," and this Court should consider the contents of Exhibit 30.
Fraser, 342 F.3d at 1037.

IV. EXHIBITS 1-2, 5-8, 10-15, 17, AND 19-28 TO THE RECKERS DECLARATION

1 **Oracle's Objections:**

2 Oracle objects to the extent these exhibits are inadmissible parol evidence.

3 **Rimini's Response:**

4 "The exception to the parol evidence rule is broad – extrinsic evidence is admissible to
5 demonstrate that there is an ambiguity in an instrument and for the purpose of construing this
6 ambiguity." *Adobe Sys.*, 84 F. Supp. 2d at 1090; *see also Welles v. Turner Entm't Co.*, 503 F.3d
7 728, 737 (9th Cir. 2007) (holding that extrinsic evidence should be consulted where the scope of a
8 license is ambiguous). Exhibits 1-2, 5-8, 10-15, 17, and 19-28 each constitute extrinsic evidence
9 demonstrating ambiguity and/or interpreting that ambiguity and are therefore admissible. It is error
10 not to consider extrinsic evidence in interpreting a contract – *even if* the Court determines that the
11 contract appears unambiguous on its face. *Wolf*, 8 Cal. Rptr. 3d at 655-56 (Cal. App. 2004).

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DATED: June 4, 2012

SHOOK, HARDY & BACON

By: /s/ Robert H. Reckers
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2012, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, District of Nevada, using the electronic case filing system. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

By: /s/ Robert H. Reckers
Robert H. Reckers, Esq.

*Attorney for Defendants
Rimini Street, Inc., and Seth Ravin*